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Supreme Court of the United States

October Term, 1977

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, *et al.*, *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Consideration of the issues in this case will be clarified by identifying at the outset the points of agreement and disagreement between the Board and ourselves with respect to the operation of § 8(f) of the National Labor Relations Act.[1] The following is common ground between the parties:

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[1] The National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 *et seq.*, will be referred to herein as the "NLRA". Section 8(f) was added by § 705 of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 545) (hereafter the "LMRDA" or "1959 Act").

Section 8(f) is addressed to the relationship between employers, unions and employees in the building and construction industry. It authorizes any employer in that industry and labor organization which has members employed in that industry to enter into an agreement covering employees who are engaged (or will upon their employment be engaged) in that industry. Section 8(f) declares such an agreement to be lawful even though the union's majority status has not been established prior to the making of the agreement.

Where the relationship between the parties is based upon a § 8(f) agreement, any employee, the employer, the signatory union or an outside union may at any time file a petition pursuant to § 9(c) to determine whether the union does represent a majority of the employees. If the union wins the election, it is certified and the agreement remains in effect. If the union loses the election, it loses the right to represent the employees and the agreement is automatically abrogated.[2]

By virtue of § 8(f), and consistent with state law, the parties may include in their agreement a union-shop clause requiring employees to become members of the union after seven days following the beginning of employment or the effective date of the agreement, whichever is later.[3] Where

[2] *Modine Mfg. Co.* v. *Grand Lodge, IAM*, 216 F.2d 326 (C.A. 6) (where another union is certified); *Retail Clerks Int'l Ass'n* v. *Montgomery Ward & Co.*, 316 F.2d 754 (C.A. 7) (where the union is decertified but no union is certified).

[3] Section 705(b) of the 1959 Act provides that such union security provisions will not be lawful if the applicable State law forbids, thereby preserving § 14(b) of the NLRA with respect to such agreements.

such a clause is agreed upon, any employee may, at any time, file a petition pursuant to § 9(e) for a secret ballot election to determine whether the employees wish to terminate the union membership requirement.[4]

Where the employer and the union have entered into a § 8(f) agreement which includes a lawful union-shop provision, and that provision has been enforced, the employer violates § 8(a)(5) of the Act if he repudiates the agreement. *NLRB* v. *Irvin*, 475 F.2d 1265, 1270-1271 (C.A. 3), enforcing in relevant part, 194 NLRB 52; see Bd. Br. 26-27.

The disagreement between the Board and ourselves concerns the rights of the parties where the employer refuses to adhere to a valid § 8(f) agreement which does not contain a union security clause (or where such a clause, although agreed upon, has not been enforced), and the employer repudiates the agreement without an election having been held under § 9(c). In the Board's view, such an employer repudiation does not violate § 8(a)(5). This was its decision in *R. J. Smith Construction Co.*, 191 NLRB 693, *reversed sub nom., Local No. 150, International Union of Op. Eng.* v. *NLRB*, 480 F.2d 1186 (C.A.D.C.). Moreover, according to the Board's opinion in this case, it follows from its interpretation of § 8(f) in *Smith*, that if a union, in order to compel compliance with a § 8(f) agreement, pickets an employer without filing a petition for election, the union violates § 8(b)(7)(C) (see Pet. 20a-21a).[5]

There is a partial point of agreement even as to this disagreement. For the Board asserts that the determinative

[4] Employers and labor organizations cannot petition for an election under § 9(e).

[5] Because it disagreed with the Board's § 8(f) premise, the Court of Appeals did not, in reversing the Board herein, pass on the

"issue in [this] case [is] whether Section 8(f) itself establishes that a union signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired until the agreement expires or the union is ousted by an employer-initiated [or employee-initiated] Board election" (Bd. Br. 18-19).

We agree that if that issue is decided against the Board (as it was by the Court of Appeals), the decision below must be affirmed. The converse, however, is not true. For, even if a § 8(f) agreement does not give the signatory union the status of exclusive bargaining representative, the Board's finding of a violation depends upon its interpretation of § 8(b)(7)(C), which is very much in issue in this case. Moreover, the Board's basic assumption that if an employer does not violate § 8(a)(5) by repudiating a § (8)(f) agreement with a minority union, that agreement is "noneffective" is plainly wrong, because it overlooks § 301(a) of the LMRA.

I. We show in point I of the brief that the essential premise of the Board's holding in this case that § 8(f) "contracts are voidable by either party if a union [after recognition] * * * obtains a majority status" and therefore "noneffective" (Pet. 20a) is contrary to this Court's interpretation of § 301(a) in *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17. In that case this Court squarely held that the right to sue under § 301(a) to enforce contracts between employers and labor organizations is not limited to labor organizations

validity of the step by which the Board expanded its *Smith* decision (which granted the employer a privilege to repudiate) into a doctrine making the picketing to protest that repudiation an unfair labor practice on the part of the union.

which represent a majority. In reaching that conclusion the Court not only took note of § 8(f) but drew therefrom significant support for its holding (369 U.S. at 27 and 29). Neither the Board nor the respondent take notice of *Lion Dry Goods* and we therefore conclude point I by suggesting that the appropriate course is to vacate the judgment below and remand the case to the Board for reconsideration in light of the holding—based on § 301(a)—that the agreement herein was not, as the Board supposed, "noneffective" when the employer refused to honor it.

II. In point II we indulge the Board's tacit assumption that § 301(a) does not bear on this case, and meet the Board on its own ground. We show that the basic point of § 8(f) is that the union authority to enter into exclusive bargaining contracts in the building and construction industry does not depend upon the existence of the support of a majority of the employees, let alone a showing of such majority support; the section and its legislative history demonstrate that the union shall have such authority even under circumstances where it is plain that the union does not have majority support, for example, where the agreement is entered into before any employees have been hired. That authority is subject to defeasance in a representation election which may be directed at any time on petition of the employees, the employer, the union party to the § 8(f) agreement or an outside union. To that critical extent, § 8(f) alters "the basic principles of the Act, which impose an affirmative obligation on unions to achieve and demonstrate majority support" (Bd. Br. 31) as a precondition for authority to bargain about employee wages and other working conditions. The Board's current interpretation of § 8(f) which is deduced from those "basic principles" rather than

from the special rules which Congress established for the building and construction industry is doomed to failure.

To lay bare the Board's errors we compare and contrast the normal rules concerning the establishment and termination of collective bargaining relationships with the scheme established by § 8(f). That comparison establishes that the office of the body of § 8(f) is to overturn the normal rule that an employer may not grant "exclusive representative status to a minority union" (*Garment Workers* v. *Labor Board*, 366 U.S. 731, 737). The authoritative Senate Report makes it plain that the purpose of § 8(f) is to permit employers and unions in the building and construction industry to enter into "exclusive bargaining contracts" even though the union does not have the support of a majority (S. Rep. No. 187, 86th Cong., 1st Sess., p. 28). Our comparison establishes further that the office of the final proviso to that section is to draw a major countervailing distinction between § 8(f) agreements and other lawful exclusive bargaining contracts by lifting the Board's contract bar rules as to § 8(f) agreements only, thereby allowing any party to petition for an election to determine the union's majority status at any time. We demonstrate that the Board's rule, which permits employers to repudiate § 8(f) agreements during their term, adds nothing to the protections afforded employee free choice by § 8(f) but rather imposes the employer's choice on those employees without an election.

Next, we rebut the Board's attempt to find significance in the fact that the language of §§ 8(a)(5) and 9(a) was left undisturbed in 1959. This fact is a total irrelevance, since Congress also left undisturbed §§ 8(a)(1), (2) and (3), whose operation was admittedly altered in the building

and construction industry by § 8(f). We then examine the legislative history in detail, and demonstrate that the Board is in error in its reliance on Congress' rejection of an administration proposal which would, among other things, have permitted certification of a union on the basis of an agreement between the employer and the union. We show that this proposal was subject to severe limitations, and was for that reason viewed as being "more restrictive and unworkable" than the proposal which became § 8(f).

We next show that the Court of Appeals was clearly right in refusing to attribute to Congress "such an exercise in futility * * * as to validate a contract with a union having a minority status, but to permit its abrogation because of the union's minority status" (480 F.2d at 1190). We note particularly that under the Board's interpretation, the right to repudiate under § 8(f) is a two-edged sword, which can also be exercised by a *minority union* to strike or threaten to strike (but not picket) during the term of an agreement in order to obtain more favorable working conditions.

We next address and rebut the Board's objections to the Court of Appeals' reasoning emphasizing that those objections rest on a policy premise which Congress expressly rejected in enacting § 8(f).

We conclude by discussing two prior decisions, one of which is mistakenly relied on by the Board and the other ignored by it, although it is a precedent squarely contrary to its decision herein. The Board asserts that *Linden Lumber Division* v. *NLRB*, 419 U.S. 301, supports the principles on which its decision herein is based. But *Linden* arose in the normal situation of a union seeking exclusive recognition on the basis of its initial recognition of majority support, and not the situation dealt with by § 8(f). Moreover,

if the *Linden Lumber* analogy were valid, it would cut *against* the Board's position, because the Board itself has held that an employer who has agreed to have the union's majority status determined by a means other than an election, cannot, if he is dissatisfied with the result, insist upon a Board election as a condition for recognition. See *Linden Lumber*, 190 NLRB 718, 721. The reason for this exception as the Board explained in its brief in this Court in *Linden Lumber* is "to encourage the parties to adhere to and follow agreements * * *." The Board's interpretation of § 8(f) is wholly at odds with that purpose. It is also at odds with the principle found decisive by this Court in *Linden Lumber* itself, namely, that "the election process ha[s] acknowledged superiority in ascertaining whether a union has majority support" (*id.* at 304). Congress followed this principle by choosing in the § 8(f) proviso the method by which a union's majority status can be challenged during the term of a § 8(f) agreement.

The prior precedent which is directly in point is *Oilfield Maintenance*, 142 NLRB 1384, where the Board expressly held that an employer was bound by a § 8(f) agreement even though the union had not demonstrated majority support, and directed the employer to bargain with that union. That *Oilfield Maintenance* is a precedent squarely contrary to the interpretation of § 8(f) which the Board adopted in *Smith* was pointed out in that case by the dissenting Board members and by the Court of Appeals when it reversed; nevertheless, no explanation of this inconsistency has ever been offered by the Board.

III. In point III we demonstrate that even if the Board's interpretation of § 8(f) is accepted, there would be no violation of § 8(b)(7)(C). We show first that it does not follow from the Board's premise (that an employer does not violate § 8(f)(5) by repudiating a § 8(f) contract) that a union violates § 8(b)(7)(C) by picketing to compel the employer to adhere to his § 8(a) agreement.

In the remainder of our argument on this issue we show that the result reached by the Board in this case cannot be reconciled wit' its holding in the *Sullivan Electric* case, 146 NLRB 1086, that § 8(b)(7) was intended only to proscribe picketing to compel "an employer's initial acceptance of the union as the bargaining representative of his employees". The statement in the Board's decision that picketing to enforce a § 8(f) agreement which an employer has repudiated is "for initial recognition purposes" is nonsensical: If a § 8(f) agreement affords recognition, picketing to enforce that agreement cannot be for "*initial* recognition"; if a § 8(f) agreement does not afford recognition, picketing to enforce it cannot be for recognition either. The effort of Board counsel to distinguish the *Sullivan Electric* case on the ground that there the union was picketing for adherence to an agreement reached between an employer and a union that had gained majority support has no basis in the Board's decisions, and therefore cannot be accepted by this Court as a basis for affirming the Board herein. See, *e.g.*, *NLRB* v. *Food Store Employees*, 417 U.S. 1, 9. Moreover, a decision by the Board issued less than three months after that herein reveals that the agency itself would not accept the distinction of *Sullivan Electric* which counsel have advanced on its behalf. In *Local 86, Painters*, 216 NLRB 1127, a majority of the Board held that the union which was party to a § 8(f) agreement had violated § 8(b)(7)(C) by picketing the employer "not, of course, to protest a supposed breach of their agreement as

our dissenting colleague believes, but to force company acceptance of new contract terms" (*id.*). If the Board had understood its own precedents as standing for the proposition that *Sullivan Electric* does not apply to a union which is recognized only pursuant to a § 8(f) agreement, it would have been irrelevant whether or not the union was protesting the employer's breach. Thus, *Painters* establishes not only that the Board's decision herein had no antecedent in *Sullivan Electric*, but also that it has no progeny. Under these circumstances this Court may well conclude that a remand to "afford[] the Board an opportunity to clarify [its] inconsistencies" (*Food Store Employees*, 417 U.S. at 9) is a nicety which the agency's performance does not merit.

ARGUMENT

I. THE BOARD'S CENTRAL DETERMINATION THAT A § 8(f) AGREEMENT IS "VOIDABLE BY EITHER PARTY" IS CONTRARY TO RETAIL CLERKS V. LION DRY GOODS, 369 U.S. 17.

The Board's holding in this case rests on the proposition that § 8(f) "contracts are voidable by either party if a union never thereafter obtains a majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a *noneffective* 8(f) contract was for initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act" (Pet. 20a-21a, emphasis added). The view that such a contract is "voidable" when the union does not have a majority, and when one party has voided it is "noneffective", rests on the Board's decision in *Smith* that an employer who repudiates an agreement under such circumstances does not violate § 8(a)(5) of the Act.

But whatever may be the merits of the *Smith* decision, see point II *infra*, the Board was clearly wrong in declaring in this case that a § 8(f) agreement is "voidable" when the union does not have majority support. For, § 8(a)(5) and its related provisions, §§ 8(b)(3) and 8(d), are not alone in providing a sanction for the enforcement of contracts between employers and unions. There is, of course, § 301(a) of the Labor-Management Relations Act of 1947[6] which provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

And this Court has squarely held in *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, that the right to sue under § 301(a) to enforce contracts between employers and labor organizations is not limited to labor organizations which represent a majority. In reaching that conclusion the Court not only took note of § 8(f), but drew therefrom significant support for its holding.

Section 8(f) is relied on at two points of the *Lion Dry Goods* analysis. In rejecting the defendant's narrow interpretation of "contracts", the Court reasoned:

> "*Third.* A 1959 enactment, § 8(f), explicitly contemplates contracts that would not fit respondents' concept of 'collective bargaining agreements.' It authorizes contracting with unions that represent persons not yet even hired by the employer. Such a contract might cover only hiring procedures and not wages, hours, and

[6] 61 Stat. 156, U.S.C. § 185(a).

conditions of employment. *Nothing supports the improbable congressional intent that the federal courts be closed to such contracts.*" (369 U.S. at 27, footnote omitted; emphasis added.)

Additionally, in holding that the right to sue under § 301 (a) is not limited to unions which represent a majority, the Court said:

> "'Members only' contracts have long been recognized. See, *e. g., Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197. Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301(a) should be read with § 9(a). Compare § 8(a)(3), § 8(a)(5), § 8(b)(3), § 8(b)(4), § 8(d). Moreover, § 8(f), the 1959 amendment considered *supra*, p. 27, contemplates contracting with unions that would not represent a majority. Lastly, if the federal courts' jurisdiction under § 301(a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased, cf. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18, *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, and litigation would be much hindered." (*Id.* at 29.)

In sum, it is clear from *Lion Dry Goods* that by virtue of § 301(a), a § 8(f) agreement is enforceable even if the union does not have majority support; therefore, it is not "voidable by either party" and does not become "noneffective" when, as here, one party purports to repudiate it. Thus, § 301(a), which the Board apparently overlooked in deciding this case (and which has not been mentioned by either

of the parties),[7] totally destroys the premise on which the Board found that the respondent Union violated § 8(b)(7)(C).

Accordingly, the Board's order cannot be enforced, see *e.g., SEC* v. *Chenery Corp.*, 318 U.S. 80, 332 U.S. 194. Thus, while we believe (and urge in points II and III hereof) that on consideration of the issues which have been briefed by the parties the judgment of the Court of Appeals denying enforcement of the Board's order should be affirmed, it appears to us the more appropriate course is to vacate the judgment below and remand the case to the Board for reconsideration in light of the holding—based on § 301(a)—that the agreement herein was not "noneffective" when the employer refused to honor it. It is the Board's responsibility in the first instance to construe § 8(b)(7)(C) with this error of law "laid bare" (*South Prairie Const.* v. *Operating Engineers*, 425 U.S. 800, 805-806, quoting *FPC* v. *Idaho Power*, 344 U.S. 17, 20).[8]

II. THE BOARD'S INTERPRETATION OF § 8(f) IS ERRONEOUS.

A. The Board's argument begins from the proposition that "[a] fundamental tenet of the National Labor Relations Act, reflected in many of its provisions, is that employees shall have the right 'to bargain collectively through

[7] The only reference to judicial enforceability of § 8(a) agreements in the Board's brief is the following sentence: "There are natural disincentives to prevent businessmen, who must deal on a continuing basis with labor organizations, from freely repudiating their agreements, even though such agreements may not be enforceable in court" (Bd. Br. 28, n. 21).

[8] A determination by the Board on reconsideration that there was no violation of § 8(b)(7)(C) would render wholly academic

representatives of their own choosing.' Section 7" (Bd. Br. 12-13). But the other fundamental tenets of the Act concerning the initiation of bargaining relationships and their termination are not identified. Thus, it is not surprising that by page 19 of that brief a reformulation of the same point has elevated this one tenet among several to "the Act's major premise." It is therefore necessary, we believe, to begin by identifying with more precision the normal rules regarding the duty to bargain.

First, the Act permits employers to voluntarily recognize as the exclusive representative of his employees a union that demonstrates majority support among a representative employee complement in an appropriate bargaining unit, but employers may not "grant exclusive representative status to a minority union" (*Garment Workers* v. *Labor Board*, 366 U.S. 731, 737).

Second, where a collective agreement is in force, "the Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective bargaining agreement of reasonable duration" (*Hexton Furniture Co.*, 111 NLRB 342, 344).

Third, when the exceptions to the contract bar rule apply to permit the holding of an election during the term of a

for purposes of this case the other issue—whether an employer who repudiates the agreement when the union has not maintained majority support thereby violates § 8(a)(5). In that connection we note that in the *Smith* case (where that issue first arose), the Board stated on brief to the Court of Appeals: "• • • the circumstances presented by the instant case are somewhat unusual and rarely encountered in the industry" (Brief for the National Labor Relations Board in *Local No. 150, International Union of Operating Engineers* v. *N.L.R.B.* (C.A.D.C.), No. 71-1689, at p. 23).

collective agreement, if the employees repudiate the incumbent, the agreement is automatically abrogated. See p. 2, n. 2 *supra*, citing *Modine Mfg. Co.*, 216 F.2d 326 (C.A. 6), and *Montgomery Ward & Co.*, 316 F.2d 754 (C.A. 7).

Finally, so long as a collective agreement is in force, the Act also "prescribes the duty to maintain [its] mandatory terms without unilateral modification for [its] duration" (*Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 147, 186).

These rules reflect the *several* competing fundamental substantive and procedural interests at stake and the appropriate weight to be accorded to each during the evolution of the bargaining relationship and depending on the particular circumstances.

Thus, the *Garment Workers* rule reflects "the guarantee of employee freedom of choice and majority rule." (366 U.S. at 736.) The contract bar rule rests on "the statutory objective of encouraging and protecting industrial stability" (*Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 121 NLRB 990, 994). And, the *Montgomery Ward* rule is derived from the proposition that "Any right to recognition as bargaining agent, which the plaintiff unions secured by virtue of their contracts, ceased and became inoperative on decertification" (316 F.2d at 757). Finally, § 8(d)'s prohibition of mid-term unilateral contract changes states "an important theme of • • • the 1947 revision of the Act • • • which was to stabilize collective bargaining agreements." (*Pittsburgh Glass*, 404 U.S. at 186.)

We now examine the scheme by which § 8(f) accommodates these interests in the construction industry:

> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer

engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, * * * *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 150(c) or 159(c) of this title."

Plainly, the office of the body of § 8(f) is to overturn the rule that an employer may not grant "exclusive representative status to a minority union" (*Garment Workers*, 366 U.S. at 737). Indeed, this is acknowledged at Bd. Br. 13, and 20, n. 12. Section 8(f) is identical to the provision reported out by the Senate Labor Committee (and adopted by the Senate, then rejected in favor of a competing proposal in the House, but included in the conference bill which was signed into law).[9] Thus, S. Rep. No. 187, 86th Cong., 1st Sess., 28[10] is authoritative and it confirms that the problem sought to be solved was that:

> "In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as

[9] We detail the legislative history at pp. __-__ *infra*.

[10] 1 NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (GPO 1959) p. 424 (hereafter "Leg. Hist.").

> 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired."

This "inconsistency" was resolved by making lawful in the construction industry both "exclusive bargaining contracts" between an employer and a construction employees union that is not a company union and which has not "established its majority status," and, as is generally true, exclusive bargaining contracts between an employer and a union which has established its majority.

It is equally plain that the office of the proviso is to draw a major countervailing distinction between § 8(f) exclusive bargaining contracts and other lawful exclusive bargaining contracts by lifting the Board's contract bar rules as to § 8(f) agreements only. There are several lessons to be drawn from the proviso:

First, the proviso confirms our understanding that the body of § 8(f) is designed to equate § 8(f) agreements and other exclusive bargaining contracts. If the Congress had not understood that except as the 1959 amendments provided otherwise § 8(f) agreements were to have the same legal ramifications as other exclusive bargaining contracts, it would have been unnecessary to include the proviso. For, only exclusive bargaining contracts have ever been considered a bar to a Board election.[11]

[11] See *Appalachian Shale Products*, 121 NLRB 1160, 1164.

Second, there is not a word in § 8(f) or its history to suggest that Congress intended to draw distinctions between § 8(f) agreements and other exclusive bargaining contracts other than the one stated in the proviso. The Board would dismiss the "language of the final proviso" as "plainly permissive" (Bd. Br. 30). But, despite the well-settled rule that an employer may not repudiate or even modify an exclusive bargaining contract so far as it settles mandatory subjects of bargaining during its term, there is no such permission for an employer to repudiate or unilaterally modify a § 8(f) agreement during its term. The fair inference, we submit, is that no such permission was intended.

Third, this inference is strengthened, we believe, by the Act's preference for the settlement of disputes as to majority through Board conducted elections rather than through litigation ~~in~~ unfair labor practice cases. "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." (*Linden Lumber Division* v. *NLRB*, 419 U.S. 301, 307.) The proviso to § 8(f) continues this "policy of encouraging secret elections" to resolve disputes as to majority. The Board's present rule that the employer may repudiate a § 8(f) agreement and force a union that claims majority status to "litigate" that "fact" in "an unfair labor practice proceeding under Section 8(a)(5) or 8(b)(7)" (Bd. Br. 27) cannot, of course, be squared with that policy.

Finally, it is manifest that the inclusion in § 8(f) of the proviso demonstrates that the 1959 Congress was conscious of, and attentive to, the importance of protecting the interest in employee freedom of choice. While that choice

is given a lesser weight than normally at the recognition stage, its protection through assured continuous access to the Board's *election processes* is thereafter given greater weight than normally. Contrary to the Board, there is nothing "anomalous" in the Congressional judgment, apparent from the words of the statute, not to change the normal § 8(d) rules as well in order to permit "an employer [to] test" the union's majority status "in the context of litigating a Section 8(a)(5) charge" (Bd. Br. 26). That additional change in the normally applicable rules would have run counter to the preference for Board elections to settle disputes as to majority. Moreover, without advancing the protection of employee freedom of choice, such a change would have undermined the competing interests in industrial peace and the stability of contracts. Permitting petitions for Board elections during the term of § 8(f) agreements allows for a peaceful and orderly determination of the employees' desires. Permitting employer repudiation of a § 8(f) agreement on the other hand destroys, in situations in which the covered employees *do* support the union, the stability during the terms of an agreement that both §§ 8(d) and (f) are designed to assure. Congress was certainly entitled to take this large difference into account. And, what § 8(f) does and does not say shows that Congress did so by sanctioning election petitions and by continuing the prohibition on employer repudiation of exclusive bargaining contracts.

B. The Board argues that it is significant that "Congress in 1959 did not, in § 8(f) or elsewhere, modify § 8(a)(5) * * *" and that section's "reference to * * * Section 9(a)'s definition" of an "exclusive bargaining representative" as the representative "selected by the majority of the em-

ployees" (Bd. Br. 23). It is true that § 8(f) did not, *in terms*, modify § 8(a)(5), but this is a circumstance without any significance whatsoever in interpreting the scope of § 8(f). For, § 8(f) likewise did not, *in terms*, modify §§ 8(a)(1), (2), (3), or §§ 8(b)(1)(A) and (2), and yet it is acknowledged that the operation of those provisions was changed by the 1959 law when the parties entered into an agreement sanctioned by § 8(f).[12] Rather, the drafting technique employed was to negate the law making it unlawful to conclude an exclusive bargaining contract only with a majority union by the blanket phrase that henceforth in the construction industry it "shall not be an unfair labor practice" to do so. Accordingly, "the language of § 8(f) and its relationship to other provisions of the Act" (Bd. Br. 23) is entirely consistent with a continuing duty of the employer to adhere to the pre-hire agreement unless and until the union has been decertified.

The Board argues further:

> "The legislative history of Section 8(f) confirms that Congress did not intend its authorization of prehire agreements in the construction industry to confer automatic representative status on the union or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a pre-hire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer. Instead, as noted, Congress provided that the representative status of the union could be challenged at any time." (Bd. Br. 24-25, footnote omitted.)

[12] The Board's argument also does not take account of the fact that "Congress in 1959 did not, in § 8(f) or elsewhere, modify" § 8(d), which forbids unilateral mid-term modifications and terminations of agreements, see 480 F.2d at 1180, n. 8, and p. 15, *supra*.

This misstates the substance of the competing provisions considered by the Congress.

The language of what was ultimately enacted as § 8(f) first appeared as § 604 of the proposed Labor-Management Reporting and Disclosure Act of 1958, as reported by the Senate Committee on Labor and Public Welfare (S. 3974, 85th Cong., 2d Sess.). This provision differed significantly from the treatment of the problem in Sen. Kennedy's original bill (S. 3738), which had provided that on a petition by an employer "asserting that [the] employer recognizes the labor organization as the representative defined in § 9(a) and has entered into a collective bargaining agreement with such labor organization," the Board would be authorized to certify the union as the exclusive representative of all the employees of the employer "in such unit as the Board may find is normally represented by the labor organization in the building and construction industry." However, by virtue of a "*Provided further*," clause, the Board was not to be so authorized where there was no collective bargaining history between the employer and the union "prior to the current agreement," or where it is alleged by or "in behalf of" any employee "and the Board finds that a substantial number of employees presently employed in the bargaining unit assert" that the union does not represent the majority of the employees.[13]

This proposal was criticized by Prof. Archibald Cox in his

[13] Section 1 of S.3738 provided in full:

"(a) section 9 (c) (1) of the National Labor Relations Act,

testimony during the Committee Hearings on S. 3738 and related bills. Prof. Cox agreed with the desirability of "legislation dealing with some of the peculiar problems of the construction industry".[14] But in his view the Kennedy bill "suffer[ed] * * * from one very serious fault. The draftsman seems to have overlooked the impact of his

as amended, is amended by inserting after the semicolon at the end of paragraph (B) the word 'or' and the following:

'(C) by an employer primarily engaged in the building and construction industry and a labor organization acting in behalf of employees engaged (or who, upon their employment, will be engaged) in the building and construction industry, asserting that such employer recognizes such labor organization as the representative defined in section 9 (a) and has entered into a collective bargaining agreement with such labor organization;'

(b) Before the period at the end of section 9 (c) (1) insert a colon and the following: '*Provided*, That the Board may, without prior thereto having conducted an election by secret ballot, certify a labor organization referred to in clause (C) of this paragraph as the exclusive representative of all the employees of an employer referred to in said clause (C) in such unit as the Board may find is normally represented by the labor organization for the purposes of collective bargaining with respect to pay, wages, hours, and other conditions of employment: *Provided further*, That the preceding proviso shall not apply where there is no history of a collective bargaining relationship between the petitioning employer and labor organization prior to the current agreement or an employee or group of employees of any individual or labor organization acting in their behalf allege, and the Board finds, that a substantial number of employees presently employed by the employer in the bargaining unit assert that the labor organization is not a representative as defined in section 9 (a)'."

[14] Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 85th Cong., 2nd Sess. (Union Financial and Administrative Practices and Procedures) (hereafter "1958 Senate Hearings"), p. 386.

language upon jurisdictional disputes in the construction industry * * *."[15] He explained that if the Board certifies a union on the basis of the unit as defined in the agreement between the employer and the union, that definition would be binding on other unions for purposes of § 8(b)(4)(C) (which bars strikes against certification) and would severely undermine the authority of the voluntary machinery for settling jurisdictional disputes which the unions and the employers in the building and construction industry had established.[16]

The Committee thereafter reported a bill (S. 3974), contained a provision (§ 604) respecting pre-hire agreements in the building and construction industry, which, but for a single phrase is identical to the present § 8(f), rather than the original proposal put forward by Senator Kennedy.[17] However, the Welfare and Pension Plans Disclosure Act which was ultimately adopted, 72 Stat. 997, contained no amendments to the Taft-Hartley Act, and so the problem remained unresolved.

Section 604 of S. 3974 of the 85th Congress was introduced in the 86th Congress *in haec verba* as § 603 of the Kennedy-

[15] *Id.*

[16] 1958 Senate Hearings, pp. 386-388.

[17] S. Rep. No. 187, 86th Cong., 1st Sess. 28, 1 Leg. Hist. 424 explained:

"The only significant change made in the language of this section of S. 1555 as compared to the similar section in S. 3974 would restrict the right to enter into agreements otherwise authorized by the section, to labor organizations of which building and construction employees are members. The purpose of this requirement was to make it clear that criminal or 'paper unions' should not avail themselves of the privilege of entering into such agreements."

Ervin bill (S.505).[18] And § 506 of the Eisenhower Administration's labor package, known as the Goldwater-Dirksen bill (S. 748) was identical to S. 3738 of the prior Congress (set forth at pp. 21-22, n. 13, *supra*), which authorized the Board to certify the union, but subject to the limitations of the "*Provided further*" clause (described at p. 21 *supra*.[19] The Kennedy-Ervin version prevailed in Committee with but the single modification just described, and was reported as § 602 of S. 1555.

S. 1555 as passed by the Senate retained its original § 602 intact, renumbered as § 702.[20] Moreover, the Kennedy-Ervin proposal was adopted in its entirety in the bill reported to the floor by the House Committee on Education and Labor (§ 702(a) of H.R. 8342),[21] and the paragraph from the Senate Report (quoted at pp. 16-17 *supra*), was adopted *in haec verba* in the House Report.[22]

The Landrum-Griffin substitute, on the other hand, was identical to the Administration's S. 748 (providing for Board certification subject to the important restrictions previously described, as its sponsors' analysis noted).[23] The

[18] I Leg. Hist. 76-78.

[19] *Id.* at 147-148.

[20] I Leg. Hist. 579-580.

[21] I Leg. Hist. 750-751.

[22] See H. Rep. No. 741 86th Cong. 1st Sess., p. 19, I Leg. Hist. 777.

[23] "Section 702 (building and construction industry): This section is a substitute for section 702 of the committee bill. It would permit the National Labor Relations Board to certify a union as the representative of employees in the construction industry without first conducting an election—if the union and the employer petition for such certification, and if there is a history of collective bargaining between the union and the employer. A substantial number of the affected employees may challenge the majority status of the union and cause an election to be conducted." (II Leg. Hist. 1522.)

analysis by the supporters of the Committee bill (Congressmen Thompson and Udall) of the Landrum-Griffin bill objected to the latter's § 702 for five reasons:[24]

> "(1) The Landrum bill permits certification and prehire contracts only where the employer and unions have a history of bargaining together. This is a cynical attempt by certain employer associations to discriminate against new businesses and contractors seeking to expand into new areas. The Landrum bill tends toward restraints of trade and monopoly."[25]
>
> "(2) The Landrum bill would unreasonably interfere with the freedom of employees to choose their own bargaining representatives."[26]

[24] II Leg. Hist. 1578.

[25] This point was illustrated by two examples.

[26] Because this is the only portion of the Thompson-Udall analysis which touches on the argument at Bd. Br. 24, we set forth their explanation in full:

> "The Landrum bill provides that the NLRB may certify a labor union as the representative of employees in the construction industry whenever the employer and the union file a petition stating that they have signed a contract fixing terms and conditions of employment. Under the usual Board rules, this certification would bar the employees from any election to choose their own representative for at least a year. The committee bill authorizes the pre-hire contracts but preserves freedom of choice in situations where elections can be held by a proviso which expressly states that the pre-hire agreement shall not be a bar to a petition for an election. Obviously this is a fairer, more democratic solution."

It is to be noted that this analysis does not suggest that the present § 8(f) is superior in that it permits the employer to repudiate a pre-hire agreement. Rather, it refers only to the lifting of the contract bar rule as the favored means "for preserv[ing] freedom of choice." Moreover in drawing the comparison the analysis fails to mention—and therefore misstated the impact of the Administration proposal on employee free choice—that a certification could be blocked at the outset by the objection of "a substantial number of employees."

"(3) There is no need for the amendment.

Section 702 of the committee bill does not open the door to sweetheart contracts or dealings with paper locals dominated by racketeers. Prehire contracts are negotiated only with unions which can supply the skilled mechanics and laborers required for construction work. The disclosures before the McClellan committee related to employees already on the payroll who were forced into racketeering unions not of their own choosing." [27]

"(4) The Landrum bill would weaken, if not destroy, voluntary machinery for the settlement of jurisdictional disputes which has operated successfully for 10 years with the support of both employers and unions." [28]

"(5) The Landrum bill is technically defective." [29]

Nevertheless the House adopted the Landrum-Griffin substitute. As part of the compromise reached in the Conference Committee, however, the Senate version was chosen, and became what is now § 8(f). The Conference Report is entirely unilluminating as to the reasons for the choice,[30] but Senator Kennedy, the leader of the Senate Conferees,

[27] This was a response to the charge that § 702 of the Committee bill opened the door to sweetheart contracts with paper unions.

[28] This is the same point that had been made by Prof. Cox in the 1958 Senate hearings (see pp. 22-23 *supra*). The Thompson-Udall analysis explained this problem in considerable length.

[29] The analysis pointed out that the:

"draftsmen of the [Landrum-Griffin] bill attempted to solve this problem by empowering the NLRB to issue certifications but only after the employer and contractor had signed an unlawful agreement. If this bill were approved, the law would say this: 'You can't lawfully make the contract without the NLRB certification, but you can't have the certification until you have made the contract.'"

[30] House Conf. Rep. No. 1147, 86th Cong., 1st Sess., 41-42, I Leg. Hist. 945-946.

and Cong. Udall, one of the House Conferees, each stated in explaining the Report to his colleagues:

> "The conference report incorporates the essential provisions of the Elliott bill authorizing labor unions and contractors in the construction industry to negotiate pre-hire agreements. *The more restrictive and unworkable provisions of Landrum-Griffin were rejected.*" [31]

In sum, the Third Circuit was correct when it said in *Irvin:* "Nothing in either the text or the legislative history of § 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will." 475 F.2d at 1271.

C. A further, decisive objection to the Board's interpretation of § 8(f) is that it attributes to a provision which was designed to meet the special practical problems in the building and construction industry an effect which is utterly impractical.[32] As the Court of Appeals observed in the *R. J. Smith* case:

> "To state the history and purpose of § 8(f) is both to reject the [Board's] contention and to decide the case,

[31] II Leg. Hist. 1432, 1722 (emphasis added).

[32] For the purposes of the discussion in this point hereof, we indulge the Board's assumption that § 8(f) agreements are "voidable by either party" if the union has not obtained a majority. But see our demonstration in point I, pp. 10-13, that such agreements, at the least, are enforceable in court under § 301(a). This assuredly ameliorates the practical difficulties caused by the Board's misinterpretation of § 8(f), and provides a more substantial disincentive to repudiation than those advanced at Bd. Br. 28. Nevertheless, § 301 does not justify the Board in misconstruing § 8(f) to deny to the aggrieved party the "concurrent, overlapping" Labor Board remedy (cf. *NLRB* v. *Strong*, 393 U.S. 357, 360) and to prohibit the union from picketing to enforce its contractual rights.

because *we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status.* The Board's interpretation, as exemplified by its application in this case, would frustrate Congress' purpose of approving pre-hire agreements in the construction industry, for it would render them voidable at will. If the union, or the employer, can neither bring nor maintain unfair labor practice complaints, pre-hire agreements would be virtually unenforceable. We are certain that this was not the purpose of Congress.

"Moreover, under the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership through flagrant unfair labor practices, thereby insuring that the union never attains a majority. This case illustrates that danger. Credible testimony established that the company never intended to comply with its labor agreements; it refused to negotiate with the union; it gave selective pay increases; it fired its only two union employees; and it refused to honor the contracts' hiring hall and union security clauses. Again, we perceive the Congressional purpose to be to the contrary." (480 F.2d at 1190, emphasis added.)

The Court of Appeals' understanding that the Board's decision would render the § 8(f) agreement "voidable at will" is confirmed by the Board's opinion in this case which, as we observed at the outset, describes the Board's "decision in *R. J. Smith* and its progeny" as holding "that such contracts are voidable by either party if a union never thereafter obtains majority status" (Pet. 20a). And a consideration of the practical consequences of that holding will show that the Court of Appeals was also correct in

refusing to attribute "such an exercise of futility" to Congress.

As *Smith* and this case exemplify, an employer who believes that he has received all the benefit of a § 8(f) agreement, and who considers it economically more advantageous to repudiate the agreement may, under the Board's view, repudiate it with impunity if the union has not demonstrated majority support. The employees are thereby deprived of the benefits of the agreement and will be able to work for the employer, if at all, only on his own unilaterally established terms; these will never be more generous that the terms of the agreement. Since, by virtue of § 8(f) itself, the employer may lawfully adhere to the agreement regardless of whether the union has obtained the support of a majority of the employees, his repudiation thereof cannot be explained as a response to the felt compulsion of the law rather than his own self-interest. And since the statute gives both the employer and the employees the right to petition for an election at any time, the possibility that the employer is repudiating the contract instead of filing a petition in order to protect the rights of the *employees* is also theoretical at best. The records in *Smith* and in this case (see p. 32, n. 36 and p. 34, text and note at n. 39, *infra*) exemplify the real life situations which the Board's interpretation of § 8(f) fosters, as the Court of Appeals recognized.

Moreover, the employer's knowledge that he can at his pleasure escape the agreement in its entirety, gives him a powerful weapon to undermine the agreement by resisting enforcement of particular terms with the threat to repudiate the whole.[33]

[33] Most agreements in this industry provide for periodic payments to health and welfare pension funds in addition to the

Additionally, the *Smith* rule makes the contract "voidable by *either* party if a union never thereafter attains majority status" (Pet. 20a, emphasis added). This means that a minority union, may repudiate a § 8(f) agreement. The AFL-CIO believes that this too is undesirable, although it would undoubtedly benefit some unions and some employees. Under *Smith*, a union which is dissatisfied with the terms of the agreement (or which believes that the employer is not adhering thereto, and is unwilling to follow the grievance procedure) could pull its members off the job. Even where the union members are only a minority of the work force the employer will often have sufficient need for their services that such action by the union (or the threat thereof) would effectively require him to comply with the union's wishes.[34] It is paradoxical, though compelled by the theory of *Smith*, that this weapon would be available only to a minority union and not to a majority union.

The Board's decisions do not address the practical consequences of its interpretation of § 8(f). But its brief in

hourly wage. Where the wage itself is higher than that on non-union jobs, an employer's threat to reject the agreement in full if the union insists on the payment to the fringe benefit funds, will put the union in an impossible dilemma. Again, a union that presses a grievance (cf. Article VI of the Agreement herein, A.63) for any violation of the agreement will risk an employer's response rejecting the entire agreement.

[34] The Board has held in *Local 86 Brotherhood of Painters, etc. (Carpet Control, Inc.)*, 216 NLRB 1127, discussed at pp. 52-54, *infra*, that a union violates § 8(b)(7)(C) if, in addition to repudiating the agreement it also pickets the employer for a new § 8(f) agreement. While we assume the result reached in that case is correct, it would not protect the employer in the situation described in the text, for § 8(b)(7) is directed only at "picketing" and not at a concerted refusal to work.

this Court takes pains to minimize the adverse effects of the *Smith* rule, asserting that it provides "reasonable assurance that such agreements will have the effect and serve the purposes which Congress intended in sanctioning them" (Bd. Br. 28). We submit that an Act of Congress should be construed, if possible, in a manner that provides more than just "reasonable assurance" that its purpose will be fulfilled. In any event, the Board's modest claim on examination comes down only to the proposition that there are some situations where § 8(f) will accomplish its purpose, *despite* the Board's decision in *Smith*. In those situations where the Board's rule makes a difference, that purpose is frustrated.

The Board says: "Employers and unions in the construction industry are able to enter into pre-hire agreements that will provide the employer with the needed certainty in determining his costs and with a ready supply of skilled labor" (Bd. Br. 28). This accurately states a major practical objective which §8 (f) is designed to achieve,[35] but the Board's interpretation defeats that objective by enabling a minority union to withdraw during the agreement. Moreover, § 8(f) was also designed to benefit the employees who provide the "skilled labor", which the Board's interpretation enables employers to exploit by entering into agreements which they intend to honor only as long as it serves their own purpose. And while we do not agree that § 8(b)(7)(C) in any way regulates the union's right to picket to protest the employer's breach (see point III, *infra*), the Board's acknowledgement that this provision "provides the union with a reasonable period of time (up to thirty days) to picket to enforce the agreement ***"

[35] See S. Rep. No. 187, 86th Cong. 1st Sess. p. 28, 1 Leg. Hist. 424.

(Bd. Br. 29), invites the question whether it is desirable (and Congress intended) that unions be compelled to employ economic weapons to enforce § 8(f) agreements and that they be deprived of the legal remedies available to enforce other collective bargaining contracts.

The other situations discussed at Bd. Br. 28 are largely beside the point, because the same result obtains under both the Court of Appeals' or the Board's view of § 8(f). Under both interpretations a union which represents a majority will be able to enforce the agreement. So too, the outcome of this case would not affect those employers, if any, who are reluctant to repudiate a pre-hire agreement for fear of generating ill will (Bd. Br. 28); by hypothesis the existence or nonexistence of legal obligations is irrelevant to their behavior. The Board adds: "In most cases, of course, as Congress assumed, employers in the construction industry will not unilaterally abrogate pre-hire agreements." (Bd. Br. 28, n. 21.[36] We agree that Congress so assumed, but it is far

[36] The one situation on which the Board relies as supposedly exemplifying enlightened self-interest, namely, the action of the employer in this case, is singularly unsuited for the purpose. See p. 34, *infra*.

The Board says: "Higdon complied fully with the pre-hire agreement on the project in connection with which he signed it" (Bd. Br. 28, n. 21). Insofar as this seeks to convey the impression that Higdon did not breach his agreement, it is bootless, given Higdon's own admission (A. 33, quoted at p. 34, n. 39 *infra*.). Moreover, the record is plain that the agreement between the union and Higdon Construction Company was not limited to a particular project; rather, it covered all employees "employed and having a job classification of or performing labor as a practical journeyman, ironworker or apprentice" within the territorial limits of the respondent local (see Articles I and III of the Agreement, A. 48 and 49). The Acceptance of Agreement, signed by Gerald J. Higdon on behalf of Higdon Construction Company, unqualifiedly declares that the undersigned "hereby accepts and approves said Agreement and becomes one of the Parties thereto." The Acceptance also states:

> "Said Agreement being in effect from April 1, 1973, covering the jurisdictional area which extends half-way to the nearest outside Local Union of Bridge, Structural and Ornamental Iron Workers." (A. 45).

more plausible that it did so in the expectation that those agreements would be enforced by the Board and the courts. The legislative history of § 8(f) provides no evidence that Congress qualified in any way the judgment which it had made in 1947, when it determined that the "natural disincentives" are insufficient "to prevent businessmen * * * from freely repudiating their agreements" (Bd. Br. 28, n. 21), and therefore reinforced these disincentives with the sanctions of §§ 8(d) and 301(a).

Moreover, the Board makes an entirely inadequate response to the Court of Appeals' demonstration that the *Smith* rule invites unfair labor practices. All that the Board says (and even this comes in a later section of that brief) is that employer unfair labor practices are deterred by §§ 8(a)(1) and 10(j) (Bd. Br. 33).[37] But § 10(j) is rarely invoked by the Board, is cumbersome,[38] and requires court

[37] The argument that the potential for employer abuse is no greater than in *Linden Lumber Division* v. *NLRB*, 419 U.S. 301, is incorrect (even assuming the case is otherwise analogous), because under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, as reaffirmed in *Linden*, an employer loses his *Linden* privilege to insist on an election if he commits unfair labor practices which are "likely to destroy the union's majority and seriously impede the election," see 395 U.S. at 600, quoted at 419 U.S. at 303-304.

[38] Under the Board's internal procedures, a petition for an injunction under § 10(j) must be authorized by the Board, on a request from the General Counsel; even before the petition for injunction is filed, many months usually pass.

intervention; this proposed palliative is plainly inadequate. The Board's brief does not even attempt to meet the Court of Appeals' point with respect to employer conduct like that in the *Smith* case itself; nor can it, given the fact that the Board had dismissed the complaint in *Smith* and ultimately gave the union any relief at all only in obedience to the Court of Appeals' mandate, *R. J. Smith Construction Co.*, 208 NLRB 615. And in the present case the General Counsel dismissed the §§ 8(a)(1), (3) and (5) charges, apparently under the compulsion of *Smith*, although the employer not only refused to deal with the union but, almost certainly deliberately selected non-union employees to work for the alter ego "Higdon Contracting Co."[39] In short, contrary to Bd. Br. 33-34 "the basis for the court of appeals' concern is [*all too*] clear."

D. The Board's objections to the result reached by the Court are likewise without merit. Most fundamentally, they start from a policy premise which Congress disavowed. The Board says: "The court of appeals' decision * * * would significantly abridge the Act's basic principle that employees shall be represented for collective bargaining purposes only by representatives whom a majority of the employees have freely selected" (Bd. Br. 29). Far from being a valid criticism of the Court of Appeals' opinion, this ob-

[39] Mr. Higdon acknowledges that he deliberately created Higdon Contracting Company (which the Board properly found to be the alter ego of Higdon Construction Company (the signatory to the § 8(f) agreement, see Pet. 20a, n. 7) "in order to, uh, get around the contract, as you put it, uh, to be able to bid with my competition, yes" (A. 33, quoted in the ALJ's decision Pet. 35a, n. 8). It was after having thus repudiated the agreement that the employer hired personnel who would be willing to work at wages sufficiently low to enable him "to bid with [his] competition". He could achieve this objective only by selecting for hire employees who were not members of the union, thereby violating § 8(a)(3), see, *e.g.*, *Phelps Dodge* v. *Labor Board*, 313 U.S. 177. And if one were to entertain the purely theoretical notion that Higdon, in the guise of Higdon Contracting Company, chose employees without regard to their union non-membership, he must have ascertained their willingness to work at the wage that he offered rather than that provided under his agreement with the union. Thus the Board's example is, at best, that of an employer who by his breach has destroyed the union majority, and then relies on the loss of majority to defend the breach. This bootstrapping is approved by the Board as permissible under *Smith*.

servation shows that that Court properly understood that the very function of § 8(f) is to "significantly abridge" these "principles" in this industry, as the Board's brief elsewhere acknowledges (Bd. Br. 19-22; see also pp. 16-20, *supra*). The Court of Appeals' decision goes no farther in doing so than did Congress.

While the Court of Appeals' decision does indeed "mean that a minority union could compel an employer to comply with a § 8(b) agreement, whether through a § 8(a)(5) bargaining order or unlimited picketing, for the entire term of the agreement *or* until the Board completes an election initiated by the employer's petition" (Bd. Br. 29; emphasis supplied), this creates no hardship on the employer, because under the last proviso to § 8(f), he may petition for an election at any time. Under the Board's view, however, he may escape his agreement without following the means prescribed by Congress, *and without giving his employees the opportunity to express their choice in a Board election*. That proviso is also Congress' answer (and that of the Court of Appeals) in the situation where the employees desire no union or some other union, for, like the employer, the employees and the other union can petition for an election which terminates the agreement if the incumbent union

loses. Since unions are normally anxious to preserve their agreements with employers, and to increase their membership, the Board is wrong when it says that "the court's decision would significantly lessen the incentives of a union with a pre-hire agreement to acquire the support of a majority of the employees subsequently hired" (Bd. Br. 30).[40]

Nor does it advance the Board's case to invoke the epithet "'top-down' organizing" (Bd. Br. 30) to describe the effect of the Court of Appeals' decision herein.[41] While that phrase connotes bringing employees under a collective agreement by a decision of the employer and the union rather than one by the employees, that is just what § 8(f) contemplates; again, the Court's decision goes no farther. For it is the voluntary § 8(f) agreement rather than "the coercion inherent in protracted picketing" which

[40] However, if the union wishes to retain the option of repudiating the agreement in order to secure more favorable terms by threat of a work stoppage, see p. 30 *supra*, the *Board's* decision, by granting that option, actually gives the union an incentive *not* to acquire the support of the majority.

[41] By use of this phrase the Board invokes without citing *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616. But the issues presented in that case, which arose outside "the context of a collective bargaining relationship" (*id.* at 627), are far afield from those concerning the force and effect of § 8(f) agreements presented here. Indeed, the one passage in *Connell* concerning § 8(f) favors our position:

> "The only special consideration given them in organizational campaigns in § 8(f), which allows "pre-hire" agreements in the construction industry, but only under careful safeguards preserving *workers'* rights to decline union representation." (*Id.* at 632, emphasis added.)

For, as we have shown, the Board's position here detracts from the statutory "safeguards preserving workers' rights", namely, the proviso to § 8(f) guaranteeing resolution of disputes concerning majority through a Board election.

results in the organization of the employees. Indeed, even under the Board's view, where a § 8(f) agreement includes a union security clause, § 8(a)(5) governs and § 8(b)(7)(C) does not (Bd. Br. 27). Thus, the Board's decision, unlike that of the Court of Appeals, "would significantly [increase] the incentives of a union with a pre-hire agreement to acquire the support of a majority of the employees subsequently hired" (cf. Bd. Br. 30) by obtaining a union security clause in that agreement. Contrast the fate of the signatory unions under the Board's decisions and in *Smith* with that of the union in *Irvin*, p. 3, *supra*.[42]

Bd. Br. 30-31 criticizes the Court of Appeals because its decision would have a result which is contrary to *the Board's* theory of what § 8(f) means in a passage that culminates in the charge that the decision would "in effect * * * accord the union the very presumption of representative status that Congress specifically declined to confer in enacting Section 8(f)" (Bd. Br. 31). But, since as we have shown (particularly at pp. 21-27 *supra*, replying to Bd. Br. 23), Congress did *not* "specifically decline[] to confer" representative status on unions which enter into § 8(f) agreements, the Court of Appeals' decision merely effectuates the actual Congressional intent.

In summing up the Board says "Under the court's decision a pre-hire agreement becomes unenforceable after a

[42] The Board's opinion here attempts to justify the conclusion reached by noting that in *Irvin* despite the union's majority status at the projects which were still under way, the "Board nevertheless dismissed the complaint therein with respect to projects not yet begun at the time the employer terminated the union contract" (Pet. 19a-20a). That misstates the basis on which the Board dismissed a portion of the *Irvin* complaint. That partial dismissal did not rest on the Board's construction of § 8(f), or on a finding with respect to the union's lack of a majority at the other projects.

Board election, initiated by the employer's petition, determines that the union lacks majority support." (Bd. Br. 31.)[43] Under the *Board's* decision, however, "a pre-hire agreement becomes unenforceable" *without* a Board election to determine that the union lacks majority support, at the instance of whichever party wishes to repudiate the agreement. Thus, a less ambiguous and more complete description of the "significant difference[s] between the court's and the Board's " position than that presented at Bd. Br. 31,[44] is as follows:

Under the court's decision the "*when*" (the agreement becomes unenforceable) is *after* the employees have made their views known in the Board election contemplated by the proviso to §8(f); under the Board's decision, the "*when*" is *before* that election, if either the employer or the union is dissatisfied with the agreement and wishes to repudiate it. Under the court's decision the "determining event" (if that means the event which determines whether the union has majority support) is the Board-conducted elec-

Rather, it was based on a limitation contained in the § 8(f) agreement in that case, which provided that it would be converted into a "project-only" agreement if the union entered into a project-only agreement with any competitor of the employer. The union in fact did enter into such other agreement and the Board's *Irvin* opinion stated: "Therefore, at the termination of each project on which [the Employer] was then working, it was free to terminate its relationship with District 50" (194 NLRB 52).

[43] This is correct as far as it goes, but it omits the important fact that under the Court's decision (and the last proviso to § 8(f)), an election can also be initiated by a petition filed by the employees or by an outside union (and of course by the incumbent union).

[44] The Board says: "The significant difference between the court's position and the Board's relates to *when* the agreement becomes unenforceable and who has the burden of triggering the determining event" (Bd. Br. 31, emphasis in original). The obscurity of

tion, and the "burden of triggering" that event is on the party which seeks to change the *status quo;* under the Board's decision the majority is to be determined, in an unfair labor practice proceeding, and the "burden of triggering" that event is on the party which wishes to preserve the agreement.[45] Further, if the Board's phrase "determining event" connotes the event which in fact terminates the actual enforcement of the agreement, there is also a significant difference: Under the court's decision the "determining event" in this sense also is the Board-conducted election "triggered" by the party seeking to alter the *status quo;* but under the Board's decision the "determining event" is the unilateral, self-interested decision of the repudiating party, which is empowered to shift to the other party the burden of establishing that the repudiation was unlawful.

Moreover, as we have stressed, it is irrelevant whether the Board's position is, or the court's is not, consistent with what the Board terms "the basic principles of the Act, which impose an affirmative obligation on unions to achieve

this sentence is achieved largely by the general phrase "relates to"; the brief does not come straight out and say what the "significant difference" *is*, or what the "significant differences" *are*. Moreover, with respect to the Board's position, the phrase "determining event" has different meanings depending on whether it refers to the event which determines that the union has lost its majority, or refers to the event which terminates the agreement; further, the term "burder" is a misnomer as applied to the position of the repudiating party under the Board's decision.

[45] The party which claims that the agreement remains valid may, under the Board's decision, file a refusal-to-bargain charge, under § 8(a)(5) or § 8(b)(3), as the case may be. Additionally, under the Board's interpretation of § 8(b)(7)(C) herein, the repudiating party may file a § 8(b)(7) charge against the union (if it has picketed to enforce the agreement), which may then defend by proving a majority. See Bd. Br. 27.

and demonstrate majority support" (Bd. Br. 31), for § 8(f) rejects those principles in this industry. What *does* matter is that 1) *only* the court's position is consistent with the specific policy of § 8(f), which imposes no "obligation on unions to achieve majority support" to achieve recognition, but instead grants the union representative that is party to an agreement authority unless and until it is revoked in a Board election which may be had at any time; and 2) *only* the court's position is consistent with another, no less basic principle of the Act—embodied in the continuing duty to bargain under §§ 8(a)(5) and 8(d) as well as § 301(a)—which § 8(f) leaves undisturbed: *pacta sunt servanda.*

E. The Board's brief asserts that "[t]his Court, in analogous circumstances, has recently reaffirmed the principles which also support the Board's decisions under Section 8(f)" (Bd. Br. 31, relying on *Linden Lumber Division v. NLRB*, 419 U.S. 301). The Board's invocation of that precedent is wholly unjustified, and indeed self-defeating. *Linden Lumber* is not "analogous" because it deals with the respective rights and duties of the parties in the ordinary situation where a union is seeking recognition as exclusive bargaining representative on the basis of its demonstration that it is the choice of the majority of the employees in the appropriate bargaining unit. As Bd. Br. 19-22 perforce concedes, § 8(f) created an exception to that situation, permitting employers to enter into agreements with unions which do not have majority support. However, if the precedents dealing with a union's achievement of majority support in the *Linden Lumber* context are pertinent where the employer seeks to repudiate a § 8(f) agreement because the union does not have a majority, the analogy would cut strongly *against* the Board's position

in this case. For where the employer has entered into a § 8(f) agreement, the situation is far more closely analogous to the situation for which the Board has recognized an exception to its *Linden* rule, which it explained as follows in its brief to this Court in that case:

> "In order to encourage the parties to adhere to their voluntary agreements, the Board will continue to find a refusal to bargain in the situation presented in *Snow & Sons, supra* [134 NLRB 709, enformed 308 F.2d 687 (C.A. 9)]. That is, if an employer agrees to have majority status determined by a means other than a Board election, he may not disclaim that determination, and insist on a Board election, simply because he disagrees with the results of that determination. * * * *Nation-Wide Plastics Co.*, 197 NLRB No. 136, 81 LRRM 1036; *Sullivan Elec. Co.*, 199 NLRB No. 97, 81 LRRM 1313; enforced 479 F.2d 1270 (C.A. 6); *Atlantic Tech. Servs. Corp.*, 202 NLRB No. 13, 82 LRRM 1407, enforced, 86 LRRM 2182 (C.A.D.C.)."[46]

So here, "[i]n order to encourage the parties to adhere to their voluntary agreements" an employer should be required to adhere to a § 8(f) agreement unless and until the union is decertified in a Board election. Thus, the *Linden Lumber* line, too, follows the principle which we believe to be decisive, but which the Board's decisions in *Smith* and this case ignore, that parties to collective agreements should adhere to them. Moreover, it is our position rather than that of the Board, which is consistent with the principle which was determined decisive in *Linden Lumber* itself, namely, that "the election process ha[s] acknowl-

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[46] Brief for the National Labor Relations Board in Nos. 73-1231, *et al.*, p. 28, n. 25. See also the Board's decision in *Linden*, 190 NLRB 718, 721.

edged superiority in ascertaining whether a union has majority support'' (*id.* at 304). Congress followed this principle by choosing in the § 8(f) proviso the method by which a union's majority status can be challenged during the term of a § 8(f) agreement; the Board's rule, which permits employer self-help without an election, subverts that principle and defeats that choice.

Given Board counsels' attempted reliance on precedent, it is all the more striking that they omit all mention of *Oilfield Maintenance Co., Inc.*, 142 NLRB 1384, which was declared to be inconsistent with *Smith* by the dissenting Board members (191 NLRB at 696, n. 8) and by the Court of Appeals (480 F.2d at 1190-1191) in that case. In *Oilfield Maintenance*, the General Counsel charged that an employer had violated § 8(a)(5) by repudiating collective agreements with five unions, and substituting therefor a contract with another union. The Board's disposition of the case is significant in two respects:

First, the Board agreed with the General Counsel that the employer had violated §§ 8(a)(5) and 8(d) by repudiating the agreements although the Board did not find that at the time of the repudiation any of the unions represented a majority of the employees, the employer having successfully rebutted the presumption of majority status which carried forward from the original recognition of the unions. See 142 NLRB at 1386-1387. The General Counsel's failure to establish the majority affected only the remedy: The employer was not required to bargain with four of the unions that had lost their majority support after their contracts expired; the employer was, however, required to remedy the unilateral changes instituted prior to the expiration of the contracts (see *id.* at 1388).

Second, the Board did require the employer to bargain with the fifth union, despite its loss of majority support, because the employer had subsequently entered into a valid § 8(f) agreement with that union:

> ''Although, for the reasons set forth above, the majority status of the Pipefitters prior to the commission of the unfair labor practices has not been demonstrated by the General Counsel, the Pipefitters' 1962 contract would still be valid under Section 8(f). Since we have found that Engineering is the *alter ego* of Oilfield, we conclude that the Respondents, whether operating as Oilfield or as Engineering, are bound by that contract until its termination date, subject to the provisions of Section 8(f).'' (*Id.* at 1387, footnote omitted.)

The Board added:

> ''We specifically note in this regard the final proviso to Section 8(f), which provides: 'That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).' '' (*Id.* at n. 10.)

Thus, *Oilfield Maintenance* confirms that the duty to bargaining during the life of an ordinary collective agreement, entered into with an exclusive bargaining representative, does continue even if the representative has lost his majority status. There is no evidence in the legislative history of § 8(f) that Congress intended to eliminate this duty during the life of a § 8(f) agreement, that is, before the election which may be directed at any time. Additionally, and directly to the point, *Oilfield Maintenance* squarely holds, contrary to the Board in *Smith* and in this case, that a § 8(f) agreement is binding on an employer even if the union has lost its majority status, though the

employer may escape that obligation if he petitions for an election and the union loses.

The Board concludes by asserting, primarily in reliance on *Linden*, that its views are entitled to prevail because "the Board's decision in this and related cases represents a reasonable resolution of various policies of the Act that the Board has evolved over a number of years on the basis of its familiarity with the statute and with the practical problems of the industry" (Bd. Br. 34). This argument is unavailing for several reasons:

First, the Board's brief does not accurately describe the provenance of its decisions in *Smith* and herein. The *Smith* case did not refer to the "practical problems of the industry" but was based entirely on the Board's reading of the language and legislative history of § 8(f); its decision in the present case rests squarely on what the Board deemed to be the necessary consequence of its decision in *Smith*, to which it adhered without even considering the "practical problems" which had been raised by the Court of Appeals in reversing *Smith*.

Second, far from evolving on the basis of experience, the Board's decision in *Smith* was an abrupt departure from a prior unanimous decision, *Oilfield Maintenance Co., Inc.*, 142 NLRB 1384. Neither in *Smith* nor thereafter has the Board explained why *Oilfield Maintenance* was abandoned, despite the pointed reference thereto by the dissenting Board members and by the Court of Appeals, see p. 42 *supra*. This brings into play what was said last Term in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143: "We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency." See also, *e.g.*, *Piper* v. *Chris-Craft*, ...

U.S. ....., 45 U.S.L.W. 4182, 4193, n. 27 (Feb. 23, 1977).[47]

Finally, the argument that the Board is entitled to prevail because the majority view "represents a reasonable resolution of the various policies of the Act" (Bd. Br. 34) is "inadmissible here, for the reason that the accommodation between [the] competing factors has already been made by Congress" (*Machinists* v. *Labor Board*, 362 U.S. 411, 428). And even assuming that this case involves review of a judgment as to the proper balance to be struck between conflicting interests, "'[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *Labor Board*, 380 U.S. [300] at 318" (*Labor Board* v. *Brown*, 380 U.S. 278, 292).

Once again, "'[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute.' *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949)" *Florida Power & Light* v. *Electrical Workers*, 417 U.S. 790, 811-812.)[48]

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[47] By contrast, *Linden Lumber* was the culmination of an "evolutional approach" (cf. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 265) which had commenced in *Aaron Bros.*, 158 NLRB 1077, a case which consciously departed from prior precedent and explained that departure. See *Gissel*, *supra*, 395 U.S. at 593-594. In the other case cited at Bd. Br. 34-35, *NLRB* v. *Enterprise Association*, 429 U.S. 507, this Court placed emphasis on the Board's consistent adherence to the "right of control principle" which was there approved, see *id.* at 525-526.

[48] The *Florida Power & Light* case presents an instructive parallel to this case. There, the Board argued that since Congress in order to further the employer interest in having loyal super-

III. THE BOARD'S INTERPRETATION OF § 8(b)(7)(C) IS ERRONEOUS.

The Administrative Law Judge deemed himself bound, in deciding this case, by the Board's interpretation of § 8(f) in *R. J. Smith Construction Co., supra*, see Pet. 32a-33a, n. 5. Nevertheless, he recommended dismissal of the complaint on the basis of his interpretation of § 8(b)(7)(C).

He relied on Board holdings that "Section 8(b)(7)(C) is not to be literally applied so as, for example, to reach picketing by a recognized union to secure compliance with an existing contract, since the section was 'intended to proscribe picketing having as its target forcing or requiring an employer's *initial* acceptance of the union as the bargaining representative of his employees.' [Emphasis supplied.]" *Bay Counties District Council of Carpenters, AFL-CIO, et al.*, 154 NLRB 1598, 1605, enforced on a different issue, 382 F.2d 593 (C.A. 9), cert. denied, 389 U.S. 1037, quoting *Building and Construction Trades Council of Santa Barbara County, AFL-CIO, et al. (Sullivan Electric Company)*, 146

visors, permitted employers to discipline them for engaging in union activity, it followed that Congress must also have intended to further that employer interest by permitting the Board to make it an unfair labor practice for a union to discipline supervisors who are union members for not engaging in union activity. This Court rejected that inference, and concluded that Congress had given employers only the option of self-help. Here, the Board argues from the last proviso to § 8(f) (which empowers employers, and others, to petition for an election during the term of a § 8(f) agreement) that Congress must also have intended to allow employers to repudiate their agreements when the union does not have majority support. See particularly *R. J. Smith*, 191 NLRB at 694, and Bd. Br. 25-26. And again, the Board's interference is belied by all that Congress said and did in framing the relevant statutory provision here, § 8(f).

NLRB 1086, 1087, where this principle was first declared (Pet. 36a).

In reversing the ALJ, the Board expressed the view that the finding of a violation necessarily followed from its decision in *R. J. Smith*:

> "For the Board to allow the Respondent to picket to enforce an 8(f) agreement if an employer decides to ignore it, as the Employer herein has done with respect to nonunion jobs, which Respondent could not enforce by means of obtaining an 8(a)(5) bargaining order, is to permit it to do by indirection what it could not do directly, and in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status. In these circumstances, we conclude that the picketing by Respondent to enforce a noneffective 8(f) contract was for initial recognitional purposes and therefore was proscribed by Section 8(b)(7)(C) of the Act." (Pet. 20a-21a)

The logic of this reasoning leaves much to be desired. We do not understand why the filing of an unfair labor practice charge against an employer that under Board law does not state an offense is doing something "directly" and picketing that employer is doing the same thing by "indirection". Further, we find equally illogical the statement that to allow picketing would "in effect nullify our decisions in *R. J. Smith* and its progeny that such contracts are voidable by either party if a union never thereafter obtains majority status". The defect in both statements is the same. It is one thing to say that a contract is "voidable," which means that a party has no legal duty to

comply with it;[49] it is quite another to say that that party has a legal right to be free from economic pressure to comply.[50] This difference is central to much of the law of labor relations, as the Board whose "familiarity with the statute" is proclaimed at Bd. Br. 34, should know. To give an obvious example, an employer is entitled to reject a union's proposed contract terms, in the sense that it is not an unfair labor practice under § 8(5) or otherwise) for him to refuse to agree; but he has no legal right to be free from economic pressure designed to compel agreement; a union which strikes or pickets the employer for that object does not violate the Act. Nevertheless, it is all too plain that the Board has found an unfair labor practice here because the union was guilty of an act of *lese majeste*—its picketing would "in effect nullify [the Board's] decisions * * *" and *this* the Board would not "permit it to do". The vehicle for that result was § 8(b)(7)(C).

In the single sentence herein which even mentions § 8(b)(7)(C), the Board accepted the "initial recognition" limitation which was recognized in *Sullivan Electric* but determined, in disagreement with the ALJ, that "picketing * * * to enforce a noneffective 8(f) contract was for initial recognition purposes". No further explanation is given, but (even if one assumes arguendo that the agreement was "noneffective" after Higdon repudiated it) the statement carries within it a fatal internal contradiction.

[49] It bears repetition that a § 8(f) contract is *not* "voidable", even given *Smith*, because the parties thereto have a legal duty, enforceable under § 301 to comply therewith. See point I, *supra*.

[50] Cf. Prof. Hohfeld's distinction between "privilege" (with its correlative "no-right") and "right" (with its correlative "duty"). W. N. Hohfeld, *Fundamental Legal Conceptions*, Yale paperbound ed., 1964, p. 26.

For, whatever "recognition" may mean in this context, picketing to *retain* the recognition which was obtained by the § 8(f) agreement cannot be picketing for "*initial* recognition". The Board's statement would be logically possible if, and only if, picketing to enforce a § 8(f) agreement which an employer has repudiated has an object to achieve greater recognition than was accorded by the agreement itself. The Board does not say that this is so, much less how it can be, and the Board's brief does not attempt to supply these omissions. We submit that since the Board's decision rests on a logical impossibility it may not stand, even if one accepts, *arguendo*, that a § 8(f) agreement is "voidable by either party" and when repudiated is "noneffective".

The Board's brief attempts to escape the logical dilemma created by the Board's decision by narrowing the *Sullivan Electric* rule to picketing by a union which has once achieved status as exclusive bargaining representative. See particularly Bd. Br. 17-18, and 23-24. If we are right in our demonstration at point II of this brief that a § 8(f) agreement *does* grant exclusive bargaining status, then *Sullivan Electric* is admittedly controlling.[51] But even if we are wrong in point II, the Board is not entitled to prevail, because Board counsel's purported distinction of *Sullivan Electric* finds no basis in the Board's decisions.

The holding of *Sullivan Electric* is described as follows at Bd. Br. 17:

[51] Indeed, for the purposes of this case (rather than for purposes of cases like *Smith* where the issue is whether the employer has violated § 8(a)(5)) the sole relevance of the Board's argument that a § 8(f) agreement does not grant the union the status of exclusive bargaining representative is to avoid *Sullivan Electric*.

"Since the primary purpose of Section 8(b)(7) was to restrain picketing designed to coerce employer recognition of the union as the bargaining representative, the Board has correctly concluded that that section was not intended to apply to situations in which the employer has already recognized the union as the Section 9(a), or majority, representative of its employees. 146 NLRB at 1087."

The critical paragraph in *Sullivan Electric* is the following:

"We find, in agreement with the Trial Examiner, that the sole objective of the Respondents' allegedly unlawful picketing was to compel Sullivan to comply with an existing valid collective-bargaining contract between the parties. However, as described fully in the Trial Examiner's Decision, it is evident that further bargaining between the parties would be required in order to implement the terms of this agreement, even if Sullivan was willing to comply therewith. Thus, by attributing a bargaining objective to the Respondents' picketing and by resorting to a strictly literal construction of the statute, it is arguable that the picketing falls within Section 8(b)(7)'s prohibition against picketing to force an employer '*to recognize* or *bargain with* a labor organization as the representative of his employees.' [Emphasis supplied.] Nevertheless, after analyzing the overall Congressional purpose behind the enactment of this section,[1] we are convinced that the words "recognize or bargain" were not intended to be read as encompassing two separate and unrelated terms. Rather, we believe they were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees. When viewed in this posture, it is clear that Sullivan had recognized and extended bargaining rights to the Respondents long before the disputed picketing commenced here and that such picketing therefore was not designed to attain those statutory objectives. Accordingly, we find in agreement with the Trial Examiner that the instant complaint should be dismissed." (146 NLRB at 1087, emphasis in original.)

There is no reference here to § 9(a) or to a "majority". Nor is there any indication that the Board conceived of a category such as that described at Bd. Br. 23 a "kind of recognition as the bargaining representative that would [not] exempt [a union] from the recognitional prohibitions of § 8(b)(7)". Rather, the *Sullivan Electric* opinion indicates that the "initial acceptance" qualification of the literal language is coextensive with the statuory "recognize or bargain."[52] But we need not negate the possibility that the Board might someday declare that it was essential to its holding in *Sullivan Electric* that the union there had been recognized as the exclusive bargaining representative or had once been chosen by a majority of the employees; it is sufficient for present purposes that the distinction advanced by its counsel in this Court was not articulated by the Board itself in *Sullivan Electric* or in any other decision. Given the "facial inconsistencies between the Board's opinion in this case and the [*Sullivan Electric*] decision", this Court must "decline[] to resolve those inconsistencies by substituting Board counsel's rationale for that of the Board." (*NLRB* v. *Food Store Employees*, 417 U.S. 1, 9, citing *Labor Board* v. *Metropolitan Life Insur-*

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[52] In the Board's holding ("the words 'recognize or bargain' * * * were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees"), the operative phrase is, but for the word "bargaining", identical to the language of § 8(b)(7) which had been emphasized earlier in the opinion.

ance Co., 380 U.S. 438, 444, and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169.) "The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." (*Food Store Employees*, 417 U.S. at 9.)

Whether the appropriate disposition of the § 8(b)(7)(C) issue is a remand to the Board as in *Food Store Employees*, and *Metropolitan Life*, or whether outright affirmance of the Court of Appeals denial of enforcement is appropriate depends on whether "possible reconciliation of the Board of the seeming inconsistency [is] reasonably possible" (see 417 U.S. at 9). While we do not feel strongly about this choice,[53] we suggest that such reconciliation is not "reasonably possible," given *Local 86, Painters* (*Carpet Control, Inc.*), 216 NLRB 1127, which the Board decided less than three months after its decision in this case. The Board there said:

> "Respondent and the Company agreed to the terms of an 8(f) agreement with which the Respondent later became dissatisfied. *In an effort to extricate itself from this agreement, Respondent picketed the Company, not, of course, to protest a supposed breach of their agreement as our dissenting colleague believes, but to force compainy acceptance of new contract terms.* This was tantamount to a repudiation by Respondent of the existing 8(f) agreement and compelling renewed recognition of it by the Company under a new agreement with different terms.

[53] Indeed, we believe that a remand for the reasons stated in point I of the brief without reaching any of the other issues is the disposition most consonant with the respective functions of the agency and the courts.

> "Respondent's picketing therefore having a recognitional object within the meaning of Section 8(b)(7)(C), the expedited election which Respondent lost was properly directed, and Respondent's continued picketing thereafter violated Section 8(b)(7)(B) of the Act, all as found by the Administrative Law Judge." (*Id.*, emphasis added.)

In *Local 86, Painters*, the dissenting opinion contended that the union was picketing to protest the employer's breach of the § 8(f) agreement and that therefore its picketing was lawful under *Sullivan Electric*. (*Id.* at 1128.) The majority disagreed with the dissent's factual premise, (that is, as to what the union's objective had been) rather than with the dissent's legal position. If the Board had understood its prior decisions (or its then very recent decision herein) as standing for the proposition that *Sullivan Electric* does not apply to a union which is recognized only pursuant to a § 8(f) agreement, as Board counsel argues, the analysis of the majority opinion would have been entirely different; it would have been unnecessary to consider whether or not the union was protesting the employer's breach. And since here the union admittedly did nothing more than to protest the breach—which was not enough to establish a violation in *Painters*, the Board's decision herein stands alone in its interpretation of § 8(b)(7)(C).[54]

[54] One additional comment must be made with respect to the *Painters* case. In describing the Painters' conduct the opinion said: "This was tantamount to a repudiation by Respondent of the existing 8(f) agreement and compelling renewed recognition * * * under a new agreement with different terms." (216 NLRB at 1127.) This passage could perhaps be read as inconsistent with the Board's decision herein (Pet. 20a), following *R. J. Smith*, that where the union has not achieved the support of a majority, it, like the employer, may repudiate a § 8(f) agreement at will. If the

Thus, *Painters* establishes not only that the Board's decision herein had no antecedent in *Sullivan Electric*, but also that it has no progeny. It is significant, too, that, as we observed earlier, the only reference to § 8(b)(7)(C) in the Board's opinion (Pet. 20a-21a) is a statement of its conclusion, which (quite aside from *Sullivan Electric*) does not follow at all from its interpretation of § 8(f) in *R. J. Smith*. Under these circumstances this Court may well conclude that a remand to "afford[] the Board an opportunity to clarify the inconsistencies" (*Food Store Employees*, 417 U.S. at 9) is a nicety which the agency's performance does not merit. Compare the majority and separate opinions in *Labor Board* v. *Insurance Agents*, 361 U.S. 477.

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opinion were so read, this further inconsistency would be an additional reason for remanding the case to the Board. But, we think that the fairer reading of the opinion is that it was the conjunction of repudiation *and* seeking a new agreement which was the gravamen of the violation in *Painters*. This reading is confirmed by the decision of the Administrative Law Judge (which the majority of the Board affirmed). The ALJ said: "In the circumstances that prevailed, Respondent having, in effect, repudiated the existing 8(f) collective-bargaining agreement—as it was free to do under *R. J. Smith*, *supra*—and having then undertaken through picket line action to force company acceptance of new terms, the only avenue of relief open to the Company was capitulation, tantamount to renewed recognition of the Respondent." (216 NLRB at 1133.) The "repudiation" sentence in the majority opinion is, we believe, a rather cryptic shorthand for the ALJ's analysis, rather than a disavowal of *R. J. Smith*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed or vacated and the case remanded to the Board for further consideration (see pp. 10-13, *supra*).

Respectfully submitted,

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